

No. 49024-2-II  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II  
Pierce County Superior Court No. 16-1-00466-2

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STATE OF WASHINGTON  
Respondent

vs.

SETH A. FULMER  
Appellant

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Brief of Appellant

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Fulmer's constitutional right to present a defense when, during Mr. Fulmer's testimony, the court improperly sustained hearsay objections and excluded statements that were not offered for their truth.
2. The trial court abused its discretion in admitting highly prejudicial flight evidence that was not probative of guilt and by refusing to give a limiting instruction to negate the prejudicial impact of this evidence.
3. The prosecutor's flagrant misconduct during rebuttal argument, including burden shifting and invoking the prestige of her office deprived Mr. Fulmer a fair trial.
4. The accumulation of errors in Mr. Fulmer's case requires a new trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Paul Brown told the detective that he did not see Mr. Fulmer at his residence after sometime in November of 2015. However, the trial court ruled that Mr. Fulmer could not testify to a conversation that he had with Mr. Brown subsequent to that time regarding his ability to make rent for January of 2016. The court also excluded Mr. Fulmer's

testimony that he learned from fellow residents that Detective Shaviri had been by the residence in January looking for him. The conversation with Brown was offered not for its truth, but rather for its effect on Brown's state of mind, i.e. to show that he knew that Mr. Fulmer was in fact still residing at the property after November, and for the verbal act of acquiescence. The fellow residents' statements were offered not for their truth but to show that Mr. Fulmer was in a position to receive timely notice of the detective's visit. Did the court violate Mr. Fulmer's right to present a defense by excluding this testimony?

2. The trial court found that Mr. Fulmer did not yet have notice of the instant charge or warrant on the date of a traffic stop in February of 2016, yet the court admitted as flight, or "guilty conscience" evidence, the fact that Mr. Fulmer gave a false name to the officer and his subsequent apology. Mr. Fulmer had an unrelated warrant for his arrest outstanding at the time. Was the flight evidence directly probative of consciousness of guilt for the specific charge of failure to register and did the trial court err in concluding that such probative value outweighed its prejudicial effect?

3. Defense counsel requested a limiting instruction when the trial court admitted Mr. Fulmer's use of a false name over objection. Was the court obligated to give a limiting instruction?
4. During rebuttal argument, the prosecutor engaged in burden shifting by relying on the absence of evidence that Mr. Fulmer did live at the residence, and invoked the prestige of her office by insinuating that the prosecution would not have filed the case if Mr. Fulmer did live at the residence. Where no curative instruction could have corrected the resulting harm, did prosecutorial misconduct deprive Mr. Fulmer a fair trial?
5. If the court's erroneous evidentiary rulings and the prosecutor's improper comments during rebuttal argument did not individually constitute reversible error, do the cumulative effect of the errors require a new trial?

C. STATEMENT OF THE CASE

1. Procedural Facts

Mr. Fulmer was charged in Pierce County Superior Court with one count of failure to register as a sex offender (third offense). CP 17. Mr. Fulmer was found guilty at trial

and the jury found that Mr. Fulmer did have two prior convictions for felony failure to register, a fact to which the parties had stipulated. CP 48-50; 75-76. The trial judge, the Honorable James Orlando, sentenced Mr. Fulmer to a standard range sentence of 50 months confinement. CP 90-94. This timely appeal followed.

2. Substantive Facts

On September 29, 2015, Mr. Fulmer was released from custody and registered with the Pierce County Sheriff's Department an address of 10804 Broadway Avenue South, Tacoma, Washington. RP 153. The State attempted to prove at trial that at some point between that date and January 13th, 2016, Mr. Fulmer relocated to a new residence and failed to update his registration. RP 13-15.

The defense moved pretrial to exclude all statements that Mr. Fulmer made during a February 9, 2016 traffic stop under ER 404(b). RP 17. During the stop, Mr. Fulmer used the false name "Shelton Fulmer," which the defense specifically objected to on the grounds of relevance at trial. RP 62. Mr. Fulmer then apologized, stating that he "wasn't ready to leave his daughters." RP 9. The trial court

indicated that the evidence was relevant to Mr. Fulmer's credibility if he testified, and to guilty conscience. RP 16-17.

When defense counsel pressed further, the trial court indicated that the statement was relevant to identification. RP 17. Defense counsel requested a limiting instruction so indicating. CP 46. The trial court ultimately refused to give a limiting instruction, noting that the jury could consider the evidence to evaluate Mr. Fulmer's credibility. RP 179-180. The trial court's formal decision indicates that the evidence was admitted to show *res gestae* and guilty conscience. CP 77-79.

Mr. Fulmer had an unrelated warrant at the time of the traffic stop. RP 40. The trial court did grant the defense motion to exclude any reference of warrants during the traffic stop, noting that the failure to register case had just been filed a few days prior to the traffic stop and that Mr. Fulmer would yet have had notice of the case or the corresponding warrant. RP 40.

The State's evidence was circumstantial. Mr. Green, an owner of the property, testified that he visited the

property a few times per week, for a period of maybe four hours per week. RP 70. The property had three separate dwellings. RP 70-71. On December 6, 2015, Green e-mailed Officer Carrillo after learning that Paul Brown had told police that Mr. Fulmer was last seen at the property in November to clarify that Green had seen Fulmer at the residence within the last few days. RP 71-72; Ex. 5. Green also testified that he or another owner were the only individuals who had the authority to allow someone to stay if rent had not been paid. RP 79.

Mr. Brown testified that he moved to the residence because his friend Kendrick Smith was an assistant manager. RP 83; 91. Brown was rarely at the property due to his work schedule. RP 84. Brown could not remember when he last saw Mr. Fulmer at the property. RP 87. He could not remember when he spoke with officers about Mr. Fulmer. RP 84.

Brown had given a statement in January, declaring that he had not seen Fulmer since some time in November, but he could not remember at trial what he had told the detective in that regard. RP 96. All he could say is that he

had his property in Fulmer's room at the time he made the statement, and was assistant manager at that time, so he believed Fulmer was not around at that time. RP 89. Brown testified that he was obligated to follow house rules, including that residents must be up to date on their rent. RP 94-95.

Mr. Smith testified that he could not recall the exact date that he had last seen Mr. Fulmer, but that he thought it was mid November in light of his statement to Detective Shaviri on January 11, 2016 that Mr. Fulmer had not been seen since mid November and that others had stayed in the room beginning December 1, 2015.

The jury heard of Smith's 2009 theft conviction, and Smith agreed on cross-examination that his housing and his job at the property were important to him. RP 107-109. Thus, he would not want to get in trouble by violating the house rules. RP 110. He conceded, though, that Fulmer did not comply with the rules regarding curfew and notifying Smith of his whereabouts. RP 105.

Detective Shaviri relied upon the November statements of Brown and Smith in concluding in his report

that Mr. Fulmer was no longer at the residence by January 11, 2016. He had made multiple attempts to check the property for Mr. Fulmer and did not find him there. RP 119. However, he never went to the actual residence on Broadway to check for Mr. Fulmer or his belongings. RP 120. He confirmed that he left a card for Mr. Fulmer at one of his visits, but did not recall getting a voicemail from Mr. Fulmer. RP 125.

Mr. Fulmer testified he lived at 10804 Broadway Ave S. in Tacoma continuously between the end of September 2015, and January 13, 2016. He attempted to testify to a conversation that he had with Mr. Brown in the end of December or beginning of January requesting to stay in January until he could make the rent. RP 168.

The trial court sustained the prosecutor's hearsay objections, refusing to allow the substance of any of these statements. RP 168-69. The trial court would only allow Mr. Fulmer to testify that he stayed at the residence in January and did not receive an eviction notice. RP 168-69.

Mr. Fulmer testified that he was home from late at night only until very early in the morning in January

because he was looking for work, doing some work under the table, and visiting his friends and his daughter. RP 170-71. He tried to testify that a few other residents had informed him that Detective Shaviri was looking for him and provided him with the detective's card in early January, but the trial court excluded this testimony as hearsay. RP 171.

Mr. Fulmer stated that he responded to the card by leaving the detective a voicemail. RP 172. In response to questioning from the prosecutor, Mr. Fulmer testified that he lied about his name during the traffic stop to avoid arrest on the unrelated DOC warrant. RP 175.

In her closing argument, the prosecutor conceded that the testimony of Brown and Smith was "difficult." RP 204-205. She ended her argument by reminding the jury that Mr. Fulmer had lied about his name during the traffic stop. RP 205. The defense argued that the testimony of Smith and Brown was unreliable and reminded the jury that they had falsely stated that Mr. Fulmer vacated the residence in November. RP 210-211.

In rebuttal argument, the prosecutor argued that there was no evidence that Mr. Fulmer “came down here” to follow up with the detective, and defense counsel’s objection to burden shifting was not sustained. RP. 223. The prosecutor went on to argue that if Mr. Fulmer did still reside at the address on Broadway, “we wouldn’t be here,” and that “if there was direct evidence that he was living there, no one would be here today.” RP 223. The prosecutor also argued that Smith and Brown had no motive to testify falsely. RP 224. She emphasized three times that Mr. Fulmer had given a false name during the traffic stop. RP 225-226.

D. ARGUMENT

**1. The trial court’s exclusion of Mr. Fulmer’s testimony regarding his conversations with other residents of the property violated his constitutional right to testify and to present a defense.**

The Sixth Amendment and Const. art. 1, § 22 guarantee the right of the accused in a criminal case to present testimony in his or her own defense. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514, 522 (1983);

*Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Due process requires that the accused have the ability to offer testimony, and thus a fair opportunity to defend against the charge. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to testify protects the ability of the accused to give relevant evidence. *State v. Roberts*, 80 Wn. App. 342, 351, 908 P.2d 892 (1996).

If defense testimony is not relevant, it is not entitled to constitutional protection. *Hudlow*, 99 Wn.2d at 16. If the testimony has minimal relevance, the court may exclude the evidence only if a compelling interest, which outweighs the defense need for the evidence, justifies the application of a rule providing for its exclusion. *Id.* If the probative value of the evidence is high, “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.” *Id.*; *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010).

The applicable standard of review for a denial of the right to present a defense is de novo. *Jones*, 168 Wn.2d at 719. Such error is harmless only if this Court “is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.” *Id.* at 724.

In *Jones*, the trial court’s refusal to allow the accused to testify that the alleged victim had consented to intercourse with himself and several other men during a drug-fueled party deprived Jones of his right to present a defense, even if the rape shield statute did apply; such error was not harmless, notwithstanding that the other evidence strongly contradicted Jones’ version of the events. *Id.*

In *Roberts*, the trial court sustained a hearsay objection and thereby prevented the accused from giving relevant testimony that a tenant, whom he alleged was responsible for the grow operation in his home, had threatened to vandalize his property. *Roberts*, 80 Wn. App. at 352-54. However, the threat was relevant to Roberts’ defense that he did not have dominion and control over the grow operation, in that it would have helped explain his state of mind in deciding not to report it to police:

The content of the alleged threat was not hearsay, as it was offered not to prove that Sylvester intended to carry out the threat, or even that Sylvester necessarily made the threat, but only to show (should the jury believe that Sylvester existed and threatened Roberts) the effect of the threat on Roberts, i.e., to cause him not to report the grow operation to the police.

*Id.* at 352 (citing ER 803(c)). By excluding the threat, and a statement that Roberts had made to a third party that a tenant in fact lived in his basement, the trial court violated Roberts' right to present his defense. *Id.* at 355.

**a. The statements that Mr. Fulmer sought to admit were highly relevant, and thus not subject to exclusion.**

Evidence is relevant if it has a tendency to make the existence of any fact of consequence more probable or less probable than it would be without the evidence. ER 401.

Under the Sixth Amendment:

The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible. However, relevant evidence may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence.

*State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Mr. Brown testified that he could not remember the last time he saw Mr. Fulmer at the residence, but that it

must have been sometime in November. RP 87-88. The State offered this evidence to show that Mr. Fulmer must have stopped residing at the address by that time or shortly thereafter.

Mr. Fulmer's defense at trial was that he resided at the same address, where he had previously registered, throughout the charging period and that Mr. Brown and Mr. Smith were unreliable witnesses because they lied at least once about when they last saw Mr. Fulmer and later could not remember exactly when they last saw him. RP 210-16.

If Mr. Fulmer were allowed to testify that, in the beginning of January, he had a discussion with Mr. Brown about his continued residency during January and his need to delay paying rent during January, and to testify to Mr. Brown's statements of acquiescence to that request, he could establish that his sole defense, that he did reside at the same address throughout the charging period, was more likely than without that testimony. RP 168.

Describing the conversation for the jury would offer an explanation as to why Mr. Brown and Mr. Smith might wish to conceal the fact of Mr. Fulmer's continued

residence at the property from law enforcement, i.e. because it was a violation of house rules for Smith's friend Brown to acquiesce to Mr. Fulmer's request for an extension on payment of the rent.

Mr. Fulmer was unable to complete his earlier development of the cover-up theory through the other witnesses because of the court's rulings during his testimony. RP 91-95; RP 107-111; RP 168-69. Mr. Fulmer was unable to testify to Mr. Brown and other unidentified residents' statements that would have established those individuals' knowledge that Mr. Fulmer was still a resident in January, which was the only issue at trial.

Establishing Mr. Brown and the other residents' state of mind when Mr. Fulmer would have testified he spoke with those individuals at the residence in January was relevant "to the ultimate issue at trial": did Mr. Fulmer actually vacate the residence prior to January 13th, 2016, and if not, why would Brown and Smith say that he did? *Roberts*, 80 Wn. App. at 352.

Indeed, this evidence rose above the level of "marginally relevant," as contradicting the testimony of

Brown and Smith through Mr. Fulmer's contrary version of his duration of residence was Mr. Fulmer's "entire defense." *Jones*, 168 Wn.2d at 721. Mr. Fulmer was entitled to testify to more than what Judge Orlando would allow, "what he did," which was a method "devoid of context." *Id.*; RP 169. Mr. Fulmer was entitled to provide the jury with complete context and his own version of the events. He was entitled to testify not just to what he did; he had a right to testify to what was said.

As in *Jones*, the trial court's exclusion of highly relevant testimony from the accused deprived Mr. Fulmer of the right to present a meaningful defense, irrespective of any countervailing interest in the exclusion of that evidence, requiring reversal. *Id.* at 721-22.

**b. The State had no compelling interest in excluding the statements sufficient to outweigh Mr. Fulmer's need to admit the evidence.**

Even under a "minimally relevant" standard, Mr. Fulmer's proposed testimony was not subject to exclusion. As a precondition for the State to show a compelling interest in excluding "minimally relevant" defense evidence, a rule of evidence providing for such exclusion

must apply. *Hudlow*, 99 Wn. 2d at 18 (the rape shield statute was applicable to the proposed testimony); *Jones*, 168 Wn.2d at 721 (even if the proposed evidence was less than “highly probative,” the rape shield statute was not applicable to the proposed testimony).

The hearsay rule, ER 801(c), did not apply to Mr. Fulmer’s proposed testimony. Mr. Fulmer and Mr. Brown’s statements to one another were not relevant or offered for the truth of the matter asserted (that Mr. Fulmer was in fact unemployed and unable to pay rent for January, or that Mr. Brown intended to keep his promise to let Mr. Fulmer stay for the duration of January). Rather, these statements were relevant because, and Mr. Fulmer offered them to show that, Mr. Brown, the listener, had knowledge as a result of the statements that Mr. Fulmer was still residing at the address in January, long after Mr. Brown claimed at trial he believed that Mr. Fulmer had vacated. *Roberts*, 80 Wn. App. at 345; *Moen v. Chestnut*, 9 Wn.2d 93, 109, 113 P.2d 1030 (1941).

In addition, Mr. Fulmer sought to offer Mr. Brown’s statements as evidence of his verbal act in

granting the request – an action that as assistant manager he had no authority to take, and thereafter, a motive to conceal. RP 94-95. With regard to Brown’s response to Mr. Fulmer’s request, its “significance lay not in the truth of any matter asserted therein but in the fact [it was] made.” *State v. Gillespie*, 18 Wn. App. 313, 315, 569 P.2d 1174 (1977); see also *State v. Rangel-Reyes*, 119 Wn. App. 494, 498, 81 P.3d 157 (2003).

Similarly, the relevance of other residents notifying Mr. Fulmer that a detective was around looking for him when he was not home lay not in its truth (as that fact was undisputed,) but in the fact that the conversations occurred, which tended to show that Mr. Fulmer was at the residence on a sufficiently regular basis to receive notice of Detective Shaviri’s visit shortly after it occurred.

Even if the hearsay rule was applicable to Mr. Fulmer’s testimony, however, the State cannot meet its heavy burden to show that the evidence was “so prejudicial as to disrupt the fairness of the fact-finding process at trial,” and that its interest outweighed Mr. Fulmer’s need to give the testimony. *Jones*, 168 Wn.2d at 720.

This type of prejudice is that which would “confuse the issues, mislead the jury, or cause the jury to decide the case on an improper or emotional basis.” *Hudlow*, 99 Wn.2d at 14. Mr. Fulmer’s testimony in support of the central issue at trial, whether he in fact maintained a continual residence at Broadway Avenue during the charging period, would have caused no such prejudice to the fact-finding process. The trial court erred in excluding Mr. Fulmer’s testimony.

Finally, the trial court’s error was not harmless. Green contradicted Brown and Smith as to the timeline of Mr. Fulmer allegedly vacating the premises, and neither of the latter witnesses had a clear recollection of when they claimed that occurred. Ex. 5; RP 87; RP 105. Even the prosecutor admitted that the testimony of both of the key witnesses was “difficult.” RP 204.

Mr. Fulmer provided a reasonable explanation for a change in his daily habits that would explain why Green did not see him again after December. RP 170. There is no way to determine whether Mr. Fulmer’s testimony would have effectively discredited Smith and Brown.

As in *Jones*, prosecution witnesses contradicted Mr. Fulmer's account. Yet, had the jury been allowed to consider the substance of Mr. Fulmer's conversations with Brown and the co-tenants, they may have found in those conversations an explanation for the inconsistency, the State witnesses' lies to law enforcement, and their "difficult" testimony.

The prosecutor benefited from the error and argued that Jones and Smith had no motivation to lie. RP 224. Had the Court allowed Mr. Fulmer's testimony, the jury "may have been inclined" to see the evidence "in a different light." *Jones*, 168 Wn.2d at 724. The exclusion of the Defendant's testimony was not harmless.

**2. The trial court abused its discretion in admitting highly prejudicial flight evidence that was not probative of guilt and refusing to give a limiting instruction to negate the prejudicial impact of this evidence.**

Evidence that is relevant under ER 401 is inadmissible if the court finds that it "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

The probative value of flight evidence is as an admission by conduct. *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010); *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.3d 984 (2001). The category of flight evidence includes “evidence of resistance to arrest, concealment, assumption of a false name, and related conduct.” *Freeburg*, 105 Wn. App. at 498.

Such evidence “tends to be only marginally probative as to the ultimate issue of guilt or innocence.” *Id.* For these reasons, specific findings are necessary to admit this evidence:

[T]he circumstance or inference of consciousness of guilt must be substantial and real, not speculative, conjectural, or fanciful. . . . the probative value of evidence of flight as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

*Id.* at 498 (quoting *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977)). The *Freeburg* held that, under ER 404(b), “[t]he State failed to show that the fact Freeburg carried a loaded gun in Canada in 1997 was evidence of consciousness of guilt in the 1994 shooting of Rodriguez, or that its probative value outweighed its harmful effect.” *Freeburg*, 105 Wn. App. at 501.

Courts “will not accept ‘[p]yramiding vague inference upon vague inference [to] supplant the absence of basic facts or circumstances from which the essential inference of an actual flight must be drawn.’ ” *McDaniel*, 155 Wn. App. at 854 (quoting *State v. Bruton*, 66 Wn.2d 111, 113, 401 P.2d 340 (1965)).

McDaniel was “wanted on several warrants, not just the one related to this incident,” a crime that had occurred months earlier. *McDaniel*, 155 Wn. App. at 855. Evidence that the car, in which McDaniel was a passenger, fled from police and evidence of his unruly arrest “did not allow a direct inference as to McDaniel’s consciousness of guilt for shooting Banks.” *Id.* Thus, the trial court erred in allowing this evidence under ER 403.

The flight evidence in this case included two interactions with Officer Norling. When the officer asked Mr. Fulmer to identify himself, Mr. Fulmer provided the name Shelton Fulmer, a fact that the trial court admitted over counsel's relevance objection. RP 62. Mr. Fulmer later admitted to the officer that he had lied about his name and apologized for doing so, commenting that he was "not ready to leave his daughters yet." RP 63-64. Defense counsel moved in limine to exclude these statements as irrelevant and inadmissible under ER 404(b). RP 12-20; 42-44.

Prior to trial, the court orally ruled that the flight evidence indicated consciousness of guilt and was probative of Mr. Fulmer's credibility. RP 17. Defense counsel asked for clarification, and the trial court indicated that the statements went to "identification." RP 17. The findings of fact and conclusions of law entered after trial base the rulings upon *res gestae* and consciousness of guilt. CP 77-80.

Under the *Freeburg* test, Mr. Fulmer's statements may have constituted flight evidence and marginally

indicated a sense of guilt, but they neither supported a substantial inference of consciousness of guilt for the specific crime charge, nor any inference of actual guilt of the crime charged. *Freeburg*, 105 Wn. App. at 501.

Mr. Fulmer had two outstanding warrants; one for an unrelated issue and one for the instant case, which the trial court actually found was too recent to be relevant in granting defense counsel's motion to exclude reference of it:

I don't think we need to do that. I think you can just tell the officer he doesn't need to talk about the warrant. It really isn't relevant to this. Mr. Fulmer hadn't been given notice. There wasn't a summons regarding this particular case. The officer can testify that he arrested Mr. Fulmer, placed him in custody, gave him his Miranda Warnings, and then the statements were made. But he doesn't need to talk about the warrants. I agree there is a significant prejudice and I think the stipulation doesn't necessarily undo that. In this particular case, the warrants haven't been outstanding but for a couple of days before he was apprehended. So just tell Officer Norling that.

RP 44. Moreover, the stop occurred on February 9, 2016, almost a month after the end of the charging period. RP 60.

In light of these circumstances, Mr. Fulmer's statements at the time of the stop regarding the use of a

false name did not permit a “direct inference” of guilt of the specific charge, as opposed to an attempt to avoid capture on a separate warrant. *McDaniel*, 155 Wn. App. at 855.

Neither of the trial court’s alternative theories for admitting the flight evidence supports the ruling. Impeachment with the commission of a crime must separately satisfy ER 404(b) (character evidence admissible if probative of certain substantive issues) and ER 609 (certain convictions admissible for impeachment). *State v. Brown*, 113 Wn.2d 520, 530, 782 P.2d 1013 (1989), opinion corrected, 787 P.2d 906 (1990) (“[The state] is therefore not always entitled to an instruction that the conviction evidence may be considered by the jury for the purpose of weighing the defendant’s credibility merely because the evidence is admissible under ER 404(b).”)

Finally, Mr. Fulmer’s use of a false name was not admissible under ER 404(b) as *res gestae*.

Evidence of other acts is admissible as *res gestae*, or “same transaction” evidence, “ ‘[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.’ ” . . .

The other acts should be inseparable parts of the whole deed or criminal scheme.

*State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981)).

In other words, the collateral act should be part “of the whole story which otherwise would” remain unexplained. *Mutchler*, 53 Wn. App. at 902. Mr. Fulmer’s use of a false name nearly a month after the end of the charging period was not part of the “same transaction” of the crime; the “story” of Mr. Fulmer allegedly vacating his residence “is complete” without this information. *Id.*

The prosecutor’s heavy reliance on the false name also illustrates that the prejudicial impact of this evidence was substantial; Ms. Chin addressed the false name as her final comment in closing argument. RP 205. She then repeatedly referenced the use of the false name during rebuttal argument, again using that fact to conclude her remarks. RP 224-25. Each of these arguments implied that

using the false name established Mr. Fulmer's unreliability, rather than the value of the evidence as flight or *res gestae*.

The trial court's refusal to give a limiting instruction was also an abuse of discretion. "When evidence is admitted for a limited purpose and the party against whom it is admitted requests such an instruction, the court is obliged to give it." *Freeburg*, 105 Wn. App. at 501. A limiting instruction is especially necessary to ensure that a jury avoids considering an unrelated crime for the purpose that the prosecutor in this case urged that this jury should consider it:

It is our view that this matter of the admission of evidence of independent and unrelated crimes, placing a defendant, as it virtually does, on trial for offenses with which he is not charged, and which may well be better calculated to inflame the passions of the jurors than to persuade their judgment, should be surrounded with definite safeguards. When it becomes apparent that certain evidence tends to prove an independent and unrelated offense, the trial judge, in the absence of the jury, should ascertain upon what basis of relevancy the state relies. If the evidence offered is shown to be relevant to any material issue before the jury, it may be admitted, and, if it is, an explanation should be made at the time to the jury of the purpose for which it is admitted. (The reason for its admission will generally be found within the five generally recognized exceptions to the rule of exclusion, but we are not prepared to say that they

are exclusive.) The court, in arriving at its decision as to the admissibility of the evidence, is of course not limited to the reasons given by the state; but the court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it should also be the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes.

*State v. Goebel*, 36 Wn.2d 367, 378–79, 218 P.2d 300 (1950).

Defense counsel requested a limiting instruction with regard to Mr. Fulmer providing a false name and address, citing a permissible basis of identification (the trial court's most recent explanation for the relevancy of the false name). CP 46. With regard to the false name, there was no basis for the trial court to refuse to give a limiting instruction; yet the court declined to give such an instruction, citing the jury's ability to consider the evidence for "credibility." RP 179-180.

Without limiting the consideration of the false name to any substantively relevant purpose, the jury was free to consider it for general impeachment, and for the inference that Mr. Fulmer is a "bad man." *Freeburg*. 105 Wn. App. at 502.

In *Freeburg*, failing to instruct the jury that it may not consider flight evidence as evidence that the accused was a “bad man.” was not harmless error. *Id.* Similarly, it cannot be said here, given the prosecutor’s emphasis on Mr. Fulmer’s use of a false name in her closing argument and the circumstantial nature of the state’s case, that the excluding the evidence or giving an appropriate limiting instruction “would have had no material affect on the trial’s outcome.” *State v. Ashurst*, 45 Wn. App. 48, 54, 723 P.2d 1189 (1986). Mr. Fulmer is entitled to a new trial, in which he may be tried only for the crime that the State elected to charge.

3. **The prosecutor’s flagrant misconduct during rebuttal argument, including burden shifting and invoking the prestige of her office, deprived Mr. Fulmer a fair trial.**
  - a. **The court abused its discretion in overruling defense counsel’s objection to the prosecutor shifting the burden during rebuttal argument.**

The prosecutor in a criminal case functions not just as an advocate, but is bound to seek a just result and to refrain from argument seeking consideration of any improper basis:

The [prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

*Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

It is improper argument for a prosecutor to shift the burden of proof by arguing that there is no reasonable doubt because if there were evidence of innocence, the defense would have presented it. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996); *State v. Dixon*, 150 Wn. App. 46, 57, 207 P.3d 459 (2009).

In *State v. Cleveland*, the prosecutor engaged in improper burden shifting by making the following argument:

None of the people who testified here have any interest in trying to create a case of sexual abuse where none exists. Mr. Cleveland was given a chance to present any and all evidence that he felt would help you decide. He has a good defense attorney, and you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you.

*State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990).

The court found that the argument was improper because it suggested that no favorable evidence existed:

The argument made by the prosecutor in the case before us was not strictly limited to a comment on the State's own evidence. The reference to Cleveland having a good defense attorney who would not overlook any opportunity to present favorable evidence clearly suggests that there is no favorable evidence because Cleveland did not present favorable evidence. The inference from this argument is that Cleveland had a duty to present favorable evidence if it existed. The prosecutor's argument was improper. Counsel's objection should have been sustained, the comment should have been stricken, and the jury admonished to disregard it. Reversal is required unless the error was harmless beyond a reasonable doubt.

*Id.* at 648; *see also State v. Trawweek*, 43 Wn. App. 99, 715 P.2d 1148 (1986) (error for the prosecutor to comment on the lack of defense evidence).

During rebuttal argument, the prosecutor made the following argument:

[Mr. Fulmer] knows this is serious stuff. He leaves a number. He knows where to go. He could come down here if he was really that concerned, but he doesn't, right? There is no evidence that he came down here to follow-up with Detective Shaviri.

RP 223. Defense counsel objected, but the Court ruled that that the prosecutor could “argue what the evidence was that was presented.” The Court commented that it was the State’s burden to prove the case beyond a reasonable doubt, but did not sustain the objection or strike the prosecutor’s argument. RP 223.

The prosecutor continued:

The evidence as presented, there is no indication that Mr. Fulmer ever came in to say, "Hey, Detective Shaviri, I'm there. Let's figure something out." Okay. That is not his burden to get up there and tell you that. But also there is a dearth of information. All of this is proving a negative, right? He wasn't there. If he was there, then we wouldn't be here. If there was direct evidence that he was living there, nobody would be here today. But there is none. Failure to register itself is about proving a negative.

RP 223. If Mr. Fulmer had not moved from the Broadway address where he had previously registered, he had no duty to “come down” to meet with law enforcement or to make a statement, and it was improper for the prosecutor to imply that the defense should have presented such testimony.

It was an abuse of discretion for the Court to overrule defense counsel’s objection, and that error invited the prosecutor to immediately proceed to increasingly prejudicial burden shifting by explicitly arguing that the lack of favorable evidence at trial meant that none existed.

Unlike in *Cleveland*, where the improper argument had “virtually no persuasive quality in the context of the facts” of the case, the State’s case here did in fact require it to prove a negative, and for that difference the trial court’s error in allowing the State to burden shift was not harmless. *Cleveland*, 58 Wn. App. at 648. The prosecutor’s argument permitted the jury to consider Mr. Fulmer’s failure to present favorable evidence as proof that none existed,

rather than holding the State to its duty to prove that Mr. Fulmer left his registered address.

**b. The prosecutor committed flagrant misconduct that no curative instruction could remedy by invoking the prestige of her office.**

Improper argument that is prejudicial, in other words where a substantial likelihood exists that such misconduct affected the outcome of the trial, may require reversal. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). In the case of error raised for the first time on appeal, the misconduct must be so flagrant and ill intentioned that an instruction would not have cured the prejudice. *Id.* at 704 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011)).

A prosecutor “cannot use his or her position of power and prestige to sway the jury” and, due to the prestige associated with his or her office and the fact-finding facilities presumably available to it, his or her argument is likely to have significant persuasive force with the jury. *Glasmann*, 175 Wn.2d at 706; *see also State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (a fair trial “certainly implies a trial in which the attorney

representing the state does not throw the prestige of his public office” or “the expression of his own belief of guilt into the scales against the accused.”) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

Few Washington cases address a prosecutor suggesting that a jury should consider the filing of the charge in determining guilt or innocence. In *State v. Susan*, a prosecutor explicitly stated, “never . . . have I ever accused any man or woman of any crime or filed an information against them until I was satisfied that they had committed the crime.” *State v. Susan*, 152 Wash. 365, 378, 278 P. 149 (1929). This was improper, according to the Court, because it indicated “his belief as to appellant's guilt before and at the time of the filing of the information. . . . based, not upon the evidence before the jury, but possibly upon other facts not disclosed at the trial” *Id.* at 379.

This type of argument is impermissible even in response to defense argument:

Even if we assume that the defense unfairly attacked the prosecutor, the prosecutor's comments neither answered these accusations nor were otherwise justified by defendant's argument. Rather, the prosecutor impermissibly invited the jury to

convict Alvarado based on her opinion that he was guilty and on the prestige of her office by responding: “I have a duty and I have taken an oath as a deputy District Attorney not to prosecute a case if I have any doubt that that crime occurred. The defendant charged is the person who did it.” The only reasonable inference from these comments is that (1) the prosecutor would not have charged Alvarado unless he was guilty, (2) the jury should rely on the prosecutor's opinion and therefore convict him, and (3) the jurors should believe [the state witness] for the same reason.

*California v. Alvarado*, 141 Cal. App. 4th 1577, 1585, 47 Cal. Rptr. 3d 289, 295 (2006). *Alvarado* held that, where the evidence of guilt was not overwhelming, the misconduct was prejudicial and that a curative instruction would not have cured the harm. *Id.*

The prosecutor's argument here is analogous. “He wasn't there. If he was there, then we wouldn't be here. If there was direct evidence that he was living there, nobody would be here today. But there is none.” RP 223. The only possible inference of this argument, that if Mr. Fulmer was innocent, if there existed any evidence of his innocence, that “nobody would be here today” was that the prosecutor had reviewed all available information and would not have filed the charge that brought the jury “here today” if, in her

opinion and belief, there was “any direct evidence” that exculpated him.

The defense did not invite this argument, and it likely affected the outcome of the trial. The questionable testimony of two witnesses, whose version of the timeline of Mr. Fulmer’s presence was directly contradicted by other testimony and whose testimony was admittedly “difficult,” was the primary evidence in the case. RP 221.

The misconduct here went beyond argument that Mr. Fulmer “had an obligation” to rebut the State’s evidence, previously found flagrant, ill-intentioned, and incurable; rather, it suggested that Mr. Fulmer could not rebut the State’s evidence, in the opinion of a prosecutor who had dutifully researched the case before filing charges. *Dixon*, 150 Wn. App. at 58; see also *Glasmann*, 175 Wn.2d at 707-712 (expressing personal opinion of guilt despite clear warning of impropriety of such argument in case law and professional standards found flagrant, ill-intentioned, and incurable.)

For the same reasons, here, the bell that Ms. Chin sounded in her rebuttal argument, which invoked the

nobility and prestige of her office to vouch for the thoroughness of the investigation by that office, was clearly improper, likely affected the outcome, and could not have been unrung by an instruction from the court. This Court should reverse and remand for a fair trial.

**4. The accumulation of errors in Mr. Fulmer's case requires a new trial.**

The accumulation of errors that, standing alone, may not be of “sufficient gravity to constitute grounds for reversal,” may require a new trial. *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). In *Coe*, the combined effect of the trial court's evidentiary errors and the prosecutor's violation of discovery rules necessitated a new trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *see also State v. Perrett*, 86 Wn. App. 312, 323, 936 P.2d 426 (1997) (three evidentiary errors that were not reversible standing alone provided independent grounds for reversal when considered together).

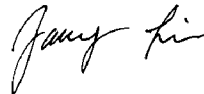
Even if the trial court's errors in excluding Mr. Fulmer's testimony and allowing the admission of his use of a false name without a limiting instruction or the

prosecutor's misconduct during her rebuttal argument do not constitute reversible error standing alone, when considered together, these errors require a new trial.

E. CONCLUSION

The trial court erred in excluding relevant, material testimony of the Defendant, by admitting flight evidence without a sufficient foundation of relevancy, by failing to limit the purposes for which the jury could consider that evidence, and by sanctioning the prosecutor's burden shifting during her rebuttal argument. The prosecutor went on to engage in flagrant and ill-intentioned misconduct, which no curative instruction could have remedied. This Court should reverse Mr. Fulmer's conviction and remand for a new trial.

Respectfully submitted this 31st day of October, 2016.



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Attorney for Appellant

COURT OF APPEALS, DIVISION TWO  
STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,  
vs.

SETH A. FULMER,  
Appellant.

Sup. Ct. No: 15-1-00466-2  
Ct. of Appeals No: 49024-2-II

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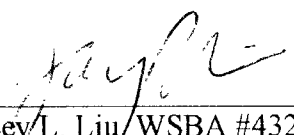
I hereby certify under penalty of perjury under the laws of the State of Washington that on October 31, 2016, I served one true and correct copy of the Brief of Appellant by hand delivery and one copy of the Verbatim Report of Proceedings by e-mail with the following:

Michelle Hyer  
Pierce County Prosecutor  
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PCpatcecf@co.pierce.wa.us

I further certify that on October 31, 2016, I caused a copy of the Brief of Appellant to be mailed to the following:

Seth A. Fulmer  
DOC # 826849  
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Aberdeen, WA 98520

Respectfully submitted this 31st day of October, 2016.



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